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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-946

CITY OF MADISON, JOINT SCHOOL DISTRICT NO. 8, CITY OF MADISON, VILLAGES OF MAPLE BLUFF AND SHOREWOOD HILLS, TOWNS OF MADISON, BLOOMING GROVE, FITCHBURG AND BURKE AND ITS AGENT THE BOARD OF EDUCATION, CITY OF MADISON JOINT SCHOOL DISTRICT NO. 8,

Appellants,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION and MADISON TEACHERS INCORPORATED,

Appellees.

On Appeal from the Supreme Court of the State of Wisconsin

BRIEF OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, AMICUS CURIAE.

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INDEX

	Page
Interest of *Amicus Curiae*	1
Statement of Case	3
Summary of Argument	4
Argument	5
As Interpreted and as Applied by the State Supreme Court, Wisconsin Statute § 11.70(3)(a) 1 and 4 Violates the First and Fourteenth Amendments to the United States Constitution	5
Conclusion	13

TABLE OF AUTHORITIES

CASES:

Abrams v. *United States*, 250 U.S. 616 (1919)	10
American Printing Co., 173 N.L.R.B. No. 17, 69 L.R.R.M. 1238 (1968)	12
Board of School Directors v. *WERC*, 42 Wis. 2d 637, 168 N.W.2d 92 (1969)	11
City of Madison, et al. v. *WERC*, 69 Wis. 2d 200, 231 N.W.2d 206 (1975)	8
Coast Radio Broadcasting Corp., 151 N.L.R.B. No. 117, 58 L.R.R.M. 1574 (1965)	12
Greer v. *Spock*, 44 U.S.L.W. 4380 (1976)	9
Lehman v. *City of Shaker Heights*, 418 U.S. 298 (1974)	9
Local 858, AFT v. *School District No. 1*, 314 F. Supp. 1069 (D. Colo. 1970)	12
Medo Photo Supply Corp. v. *NLRB*, 321 U.S. 678 (1944)	11
NLRB v. *Magnavox Co.*, 415 U.S. 322 (1973)	12
Pickering v. *Board of Education*, 391 U.S. 563 (1968)	7, 8
Police Department v. *Mosley*, 408 U.S. 92 (1972)	9

Page

CONSTITUTION OF THE UNITED STATES:

First Amendment 2, 4, 5, 6, 8, 9, 10

Fourteenth Amendment 4, 5, 6, 10

WISCONSIN STATUTES:

Sec. 11.70(3)(a) 1 and 4 .....4, 5, 6

OTHER REFERENCES:

Karst, *Equality as a Central Principle in the First Amendment,* 43 U. Chi. L. Rev. 20 (1976) 9

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The American Association of University Professors appears *amicus curiae,* with consent of all parties.

INTEREST OF AMICUS CURIAE

The American Association of University Professors (AAUP) was founded in 1915 to advance the standards, ideals and welfare of teachers and research scholars in universities and colleges. Since its inception

the Association has formulated Statements, frequently in concert with other national organizations, intended to establish minimum standards of institutional practice in higher education. Paramount among these is the 1940 *Statement of Principles on Academic Freedom and Tenure* (1940 *Statement*), drafted jointly with the Association of American Colleges and currently endorsed by almost 100 educational organizations and learned societies. To a large extent, Association standards are recognized and relied on by faculties, administrations, and governing boards in institutions of higher education.

In its 1972 *Statement on Collective Bargaining,* the Association recognized collective bargaining as an effective means to supplement its basic programs, including the advancement of academic freedom. Since 1972 the Association has provided assistance in collective bargaining on a selective basis to interested local chapters of the Association at particular colleges and universities. As of March, 1976, the Association included 75,086 members in 1,372 chapters; approximately 20,000 faculty represented by 40 Association chapters participate in collective bargaining in both the public and private sector.

The decision by the Supreme Court of Wisconsin in the instant case implicates the First Amendment rights of all public employees engaged in collective bargaining, including teachers and research scholars at public universities. Accordingly, as an organization deeply committed to the civil liberties of teachers and research scholars, and which has affiliated chapters engaged in collective bargaining, the Association believes it is uniquely situated to address this Court as *amicus curiae* in the present litigation.

STATEMENT OF CASE

Appellant board of education (hereinafter "board") and Appellee Madison Teachers, Inc. (hereinafter "MTI") were parties to a collective bargaining agreement which terminated on December 31, 1971. On January 25, 1971, during negotiations for a successor agreement, MTI proposed a contractual requirement that non-member teachers pay full union dues. This "fair share" proposal was repeatedly rejected by the board throughout the year.

By December 6, 1971, the date of the Board's regular public meeting, the board and the MTI had reached an impasse in their negotiations. The MTI had arranged to have pickets present and 300-400 teachers in attendance at the auditorium during the meeting. A portion of the board meeting was devoted to expressions of opinion by the general public. During this period, several citizens spoke, including the union representative, who expressed his approval of the fair share proposal and concluded his remarks by presenting a statement, signed by 1,300-1,400 teachers, urging a resumption of negotiations and an early agreement.

An individual teacher spoke immediately following the union representative. He read a petition, which requested a one-year deferral of consideration of the fair share issue, and proposed the following:

> 1) The fair-share concept being negotiated be thoroughly studied by an impartial committee composed of representatives from all concerned groups. 2) The findings of this study be made public. 3) This impartial committee will ballot (written) all persons affected by the contract agreement for their opinion on the fair share proposal. 4) The results of this written ballot be made public.

After reading the petition, the speaker noted that 417 teachers had signed it. He also stressed that the petition did not advocate a position on the fair share proposal, but only called for clarification and communication. Except for a question from the board president asking whether he intended to "communicate" the petition to the board, there was no other exchange between the teacher and any member of the board.

MTI filed a complaint with the Wisconsin Employment Relations Commission (hereinafter "WERC") claiming that the board, by permitting the teacher to speak at this regularly scheduled and otherwise public meeting, had committed a "prohibited practice" under Wisconsin Statute § 11.70 (3)(a) 1 and 4. WERC ordered the board to

> . . . immediately cease and desist from permitting employees other than representatives of Madison Teachers Inc., to appear and speak at meetings of the Board of Education, on matters subject to collective bargaining. . . .

The board argued before the state courts that the WERC order requiring it to forbid teachers who are also citizens from speaking at an open, public meeting forced it to violate the First and Fourteenth Amendments to the United States Constitution. Nevertheless, this order was upheld by the Supreme Court of Wisconsin.

SUMMARY OF ARGUMENT

As interpreted and as applied by the state supreme court, Wisconsin statute § 11.70(3)(a) 1 and 4 violates the First and Fourteenth Amendments to the United States Constitution:

1. The statute denies certain teachers the right to present their views on school affairs in the course of a regularly scheduled public meeting of the school board held for the express purpose of eliciting citizen comment on those affairs. In this respect, the statute abridges their freedom of speech and of petition as citizens;

2. The statute impermissibly discriminates against certain teachers by selectively excluding them from participating in a public forum in which all others are free to be heard. In this respect, the statute denies to them the equal protection of the law.

ARGUMENT

As Interpreted and as Applied by the State Supreme Court, Wisconsin Statute § 11.70(3)(a)1 and 4 Violates the First and Fourteenth Amendments to the United States Constitution.

This Court is bound to rule against the constitutionality of Wisconsin statute § 11.70(3)(a) 1 and 4 because of the unfortunate interpretation given to that statute by the state's highest court. As interpreted, that statute requires a public school board to prevent certain persons even from addressing it in an open and public meeting. As applied, the statute flatly forbids any statement or petition by a particular class of teachers, regardless of the truth, the relevance, or the unexceptionable manner of their proposed presentation. The statute forbids them to speak, moreover, although the school board is required in the course of the same public meeting to hear from others who seek action by that board which those forbidden to speak may believe to be injurious to the public interest as well as to their own interests as teachers, citizens, parents, and taxpayers. The statutory prohibition upon their equal freedom of speech and of petition operates, finally, even supposing that what they wish to say or to submit may

not otherwise be offered by any other person and may, moreover, be based on information and experience that others will not have shared.

The basis of the state court's extraordinary decision is that court's understanding of the "exclusivity" principle enacted by § 11.70(3)(a) 1 and 4. As applied by the state court, the "exclusivity" principle overrides the First and Fourteenth Amendments to enable a state to regulate the public meetings of governmental bodies for the express purpose of supressing the impact of dissent. Insofar as a given individual is employed by a school in which a majority of the teachers have chosen to be represented by a union, those persons not choosing to become members of that union are nonetheless stripped of their right to appear as any other citizen and to speak at an open public meeting, without consent of the union spokesperson. *Amicus* AAUP believes that any statute, so construed and so applied, clearly denies equal protection of First Amendment rights. We respectfully join in urging this Court to reverse.

Our argument can be very briefly summarized. All persons, including teachers, are entitled to the equal protection of the First Amendment when they ask merely to speak on matters of general interest under consideration in a public meeting conducted by a government body with power to dispose of these matters. The fact that the matters under public review may be particularly important to them professionally, and the fact that the view they would offer might itself be in disagreement with the view offered by others who are also affected professionally, cannot possibly state a just reason for suppressing their equal right to be heard. Rather, the purposes of the First Amendment are themselves subverted when the only persons denied

their freedom of speech are the very persons most likely to offer information and views not otherwise as likely to be brought to public attention by those who are allowed to speak. The irony of this case is, above all, that those most likely to contribute to that diversity of views it was the very function of the required public meeting of the school board to elicit were the very persons *exclusively* forbidden to do so.

The importance of affording individual teachers equal protection to venture dissent, most especially on school matters of public importance, has been fully appreciated by this Court in *Pickering* v. *Board of Education,* 391 U.S. 563, 572 (1968):

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions.

There is in this case no suggestion that the teachers denied that opportunity by the state supreme court's statutory interpretation had "waived" their rights to attend or to participate in the scheduled public meeting on equal terms with the freedom of others to do so —no basis at all for any conclusion that they had sought the advantages of union membership in exchange for an enforceable personal agreement that, whatever their personal and professional views on whatever the union might propose, they would agree to suppress these views in exchange for the collective benefits of that membership. It is accordingly unnecessary for this Court to decide whether such a waiver, were it permitted by Wisconsin law, might itself raise a substantial federal question. Rather, the state supreme court

held that the state itself could and did forbid them to speak and to address the questions then in public controversy, literally and solely as an involuntary condition of their public employment. Thus, the decision specifically directed the school board not to permit "employes, other than representatives of Madison Teachers Inc., to appear and speak." 69 Wis. 2d at 209, 231 N.W.2d at 211. Clearly this is not tolerable, consistent with what this Court has declared in *Pickering* (*supra* at p. 568):

> [Insofar as the state supreme court's opinion] may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court.

The State of Wisconsin has, by statute, committed itself to the proposition that there is a sufficient public interest in the consequences of its labor relations with public teachers that no binding agreement is to be made absent a fair opportunity for public discussion and review before the authoritative government body, meeting in regular open session. The forum which the state itself provided is the very forum most sheltered of all by the First Amendment, and least defensible of all in which to tolerate the selective exclusion of persons merely wishing to express their view that the school board should conduct further study before adopting a proposal that would determine the welfare of the public schools.

This is not a case where the forum was a peculiar or nontraditional one, as the curtilage of a jail, the anteroom of a library, or the captured audience of a public bus. (*See, e.g., Lehman* v. *City of Shaker Heights,* 418 U.S. 298 [1974] and cases cited therein.) It is, rather, a case in which the state has elected to provide this forum for citizen review of pending public business while simultaneously discriminating among those who may be heard. Even in the most recent utterances by this Court, dealing with the most sensitive kind of forum (*i.e.,* a military base), it has been made emphatically clear that such a practice offends the Equal Protection Clause and the First Amendment. *Greer* v. *Spock,* 44 U.S.L.W. 4380 (1976). *See also Police Department* v. *Mosley,* 408 U.S. 92 (1972) and cases cited therein; Karst, *Equality as a Central Principle in the First Amendment,* 43 U. Chi. L. Rev. 20 (1976).

The sole justification for this discriminatory treatment of dissenting teachers is found in the state court's suggestion that it was necessary for labor peace: *i.e.,* that unless the designated union representative were allowed exclusive authority to ration what would be said by any teacher in the course of the public hearing, the impact of what might be heard might not only weaken the force of the union's own unilateral presentation but also serve to demoralize the confidence of its members. As a national association whose local affiliates engage in collective bargaining, the American Association of University Professors shares the anxiety that open public review, prerequisite to a government agency agreeing to specific collective bargaining terms, does present such hazards and may not itself be constitutionally required. In spite of the fact that the subjects of bargaining in the public sector (permissive as well as mandatory) may range very wide and may well involve public interests, making it legitimate for

a state to require such a general hearing before an agreement is settled, we are not arguing that such a procedure is required of any state. This case does not present that issue and does not require this Court to say anything about it.

Nevertheless, we know of no constitutional restriction which forbids a state to require, as Wisconsin has in this case, a public meeting open for the very purpose of ventilating public issues involved in public sector collective bargaining as a means of democratic restraint to be observed before any final agreement is entered into. *And when that step is taken, we are clear that the First and Fourteenth Amendments forbid the selective exclusion of any person, least of all a teacher who may himself be affected by the outcome, from an equal right to be heard.* In this setting, the expedient good of labor peace must yield to the ultimate good better reached by free trade in ideas. As Mr. Justice Holmes put it:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.
>
> *Abrams* v. *United States*, 250 U.S. 616, 624 (1919) (dissenting opinion)

We would also note that reversal of the decision below, limited in the manner we suggest, raises no serious questions respecting collective bargaining practices in either the private or public sectors. Indeed, the state court's interpretation of state law (requiring the discriminatory suppression of some teachers) was originally believed to be unnecessary and improper by the Wisconsin labor board (WERC). In a previous case, that board had determined that the *denial* of the right of individual teachers to speak at a public meeting of a mere school committee (much less a scheduled regular meeting of the school board), far from being required by the Wisconsin statute, was itself an unfair labor practice. That determination was reversed by the state supreme court in *Board of School Directors* v. *WERC*, 42 Wis. 2d 637, 168 N.W.2d 92 (1969). We are unaware of any decision in any other jurisdiction in agreement with the current Wisconsin decision on facts at all similar to those now before this Court.

Moreover, the interpretation of the Wisconsin statute is *not* favored by analogy to judicial and National Labor Relations Board decisions respecting federal labor law applicable to the private sector. In *Medo Photo Supply Corp.* v. *NLRB*, 321 U.S. 678 (1944), the only case cited by the state supreme court which involves the "exclusivity" principle, the employer "induced" some of its employees to abandon the exclusive bargaining agent by granting them wage increases. The inducement occurred during "direct negotiation" at a private "conference" between the company manager and the dissident employees. This Court found that the employer violated his duty to bargain exclusively with the duly designated bargaining agent. None of the factors which led this Court to find an un-

fair labor practice in *Medo* are present if school employees who are not representatives of the exclusive bargaining agent "appear and speak . . . on matters subject to collective bargaining" at an open meeting of a public school board.

The District Court in *Local 858, AFT* v. *School District No. 1,* 314 F. Supp. 1069, 1075, 1076 (D. Colo. 1970), sustained exclusive union use of "only those internal channels of school communication which are not traditionally of a public nature," and only when no "normal means of communication" were impaired. This Court's decision in *NLRB* v. *Magnavox Co.,* 415 U.S. 322, 325 (1973), which held that "the place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees," seems to reject the balance struck in *Local 858* between the exclusive privileges of the majority union and the access of dissident employees to internal channels of communication. The fact that this Court in *Magnavox* afforded additional latitude for "the dissemination of views," however, only emphasizes the speech-protective aspects of *Local 858.*

Finally, numerous NLRB decisions hold that the mere statement of opinion or argument for a position by an employee in the presence of an employer does not violate the "exclusivity" principle. For example, in *Coast Radio Broadcasting Corp.,* 151 N.L.R.B. No. 117, 58 L.R.R.M. 1574 (1965), the NLRB held that it is not an unfair labor practice even for a private employer to receive unsolicited proposals and for management representatives to meet with dissident employees while remaining noncommittal. Cf. *American Printing Co.,* 173 N.L.R.B. No. 17, 69 L.R.R.M. 1238 (1968).

CONCLUSION

For the reasons outlined in this brief, *amicus curiae* respectfully urges that the judgment of the Supreme Court of Wisconsin be reversed.

Respectfully submitted,

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